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ABSTRACT

The Title IX transition period for athletics and physical education ends on July 21, 1978. Three documents are included here to assist institutions in their efforts to implement Title IX: (1) a summary of the regulation as it affects athletics; (2) a news release and an option issued by the general counsel of the Department of Health, Education, and Welfare, reaffirming the applicability of Title IX to revenue-producing intercollegiate athletics, and a summary of congressional attempts to exempt revenue-producing sports; and (3) a memorandum to the secretary of HEW from the Secretary's Advisory Committee on the Rights and Responsibilities of Women on the importance of equal athletic opportunity for women. (MSE)

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project on the status and education of **women**

UPDATE ON TITLE IX AND SPORTS

Title IX Transition Period for Athletics & Physical Education Ends on July 21, 1978

When the Title IX regulation went into effect in July 1975, secondary and post-secondary institutions were given a three year period to complete the transition to full compliance. That transition period ends on July 21, 1978.

Three documents are included here to assist institutions in their efforts to implement Title IX:

- A summary of the Title IX regulation as it affects athletics.
- A news release and an opinion issued by the General Counsel of the Department of Health, Education and Welfare (HEW), reaffirming the applicability of Title IX to revenue producing intercollegiate athletics; and a summary of congressional attempts to exempt revenue-producing sports from Title IX;
- A memorandum to the Secretary of HEW from the Secretary's Advisory Committee on the Rights and Responsibilities of Women on The Importance of Equal Athletic Opportunity for Women;

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SUMMARY OF THE TITLE IX REGULATION IN REGARD TO COVERAGE OF SPORTS

The implementing regulation for Title IX went into effect on July 21, 1975. Copies of the regulation can be obtained by writing the Office for Civil Rights, Department of Health, Education and Welfare, Washington, DC 20201.[1]

The following summary of Title IX coverage of athletics is taken from the "Summary of the Regulation for Title IX Education Amendments of 1972" prepared by the Project on Equal Education Rights (PEER).[2]

ATHLETICS SEC. 86.41[3]

General Coverage. The regulation says that no person may be subjected to discrimination based on sex in any scholastic, intercollegiate, club or intramural athletics offered by a recipient of federal education aid.

Separate teams and contact sports. Separate teams for each sex are permissible in contact sports or where selection for teams is based on competitive skill. Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and any other sport "the purpose or major activity of which involves bodily contact."

In noncontact sports, whenever a school has a team in a given sport for one sex only, and athletic opportunities for the other sex have been limited, members of the other sex must be allowed to try out for the team.

Equal Opportunity. A school must provide equal athletic opportunity for both sexes. In determining whether athletic opportunities are equal, HEW will consider whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes. The Department will also consider (among other factors): facilities, equipment, supplies, game and practice schedules, travel and per diem allowances, coaching (including assignment and compensation of coaches), academic tutoring, housing, dining facilities, and publicity.

Equal expenditures are not required, but HEW "may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

Adjustment period. Elementary schools must comply fully with the section covering athletics "as expeditiously as possible" but no more than one year from the effective date of the regulation Secondary and post-secondary institutions have three years from the regulation's effective date to comply fully.

STUDENT FINANCIAL AID SEC. 86.37(c)[4]

Athletic scholarships. An institution which awards athletic scholarships must provide "reasonable opportunities" for both sexes, in proportion to the number of students of each sex participating in scholastic or intercollegiate athletics. Separate athletic scholarships for each sex may be offered in connection with separate male/female teams to the extent consistent with both the section on scholarships and the section on athletics (86.41).

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[1] Also helpful is a memorandum, available from the same address, entitled "Elimination of Sex Discrimination in Athletic Programs," September 1975.

[2] Reprints of the complete PEER summary of the Title IX regulation are available upon request from PEER, 1029 Vermont Ave., NW, Washington, DC 20005. Single copies free; bulk copies, $5 per hundred.

[3] The number refers to the Title IX Regulation, 45 CFR Part 86, the text of which appears in the *Federal Register*, June 4, 1975, page 24128ff.

[4] Id.

APPLICABILITY OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 TO REVENUE PRODUCING INTERCOLLEGIATE ATHLETICS

News Release from HEW, April 27, 1978
Reaffirming Title IX Coverage of Revenue Producing Intercollegiate Athletics

The Department of Health, Education and Welfare made public today an opinion of its General Counsel, reaffirming the applicability to revenue-producing intercollegiate athletics of Title IX of the Education Amendments of 1972.

At the same time, the Department made public a directive from Secretary Joseph A. Califano, Jr. to General Counsel F. Peter Libassi and to David S. Tatel, Director, and Cynthia Brown, Deputy Director, for Compliance and Enforcement, of the Office for Civil Rights, instructing them to proceed with a review of additional steps that may be needed to aid in the implementation of Title IX, as it applies to intercollegiate athletics.

Califano said he had requested the legal opinion because college and university officials and other interested individuals and organizations had asked for clarification of the Department's view of the 1972 law and the regulations that were issued under it in 1975.

In making the documents public, Califano said:

"Now that any doubts have been removed about the applicability of Title IX to the full range of intercollegiate athletics, I hope that institutions of higher education and women's groups will move forward together with the important task of implementing this basic civil rights law."

MEMORANDUM

To: The Secretary [of HEW]
From: F. Peter Libassi [General Counsel, HEW]
Subject: Applicability of Title IX of the Education Amendments of 1972 to Revenue Producing Intercollegiate Athletics

Issue

You have asked our opinion as to whether an institution of higher education which is receiving Federal financial assistance must comply with the prohibition against sex discrimination imposed by Title IX of the Education Amendments of 1972 and the regulations promulgated thereunder (45 C.F.R. Part 86) in the administration of its revenue producing intercollegiate athletic activities.

Conclusion

Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) prohibits sex discrimination in any "education program or activity" receiving Federal financial assistance. In our opinion, a revenue producing intercollegiate athletic program is (a) an education program or activity within the meaning of Title IX, and (b) an integral part of the general undergraduate education program of an institution of higher education. Accordingly, in our opinion, an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity if either the athletic activity or the general education program of which the athletic activity is a part is receiving Federal financial assistance.

Discussion

Section 901(a) of Title IX of the Education Amendments of 1972 provides as follows:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

There is no reference anywhere in Title IX to revenue producing athletics, and the term "education program or activity" is not defined. There is, however, some indication that Congress intended that term to have an expansive meaning. Section 901(a) of Title IX provides a series of exemptions from the general prohibition. Among them are exemptions for the Boy Scouts, the Girl Scouts, and social fraternities and sororities. We assume that absent the exemptions, each of these groups of organizations would be subject to the prohibition against sex discrimination as an education program or activity. In our view a definition of "education program or activity" that encompasses social fraternities and sororities also encompasses intercollegiate athletics, including revenue producing athletics as well.

The limited legislative history for Title IX tends to support a broad view of what is an education program or activity, but is less clear with respect to whether athletics, and particularly revenue producing intercollegiate athletics, are included in the term. In the only comments of any length on the subject, Senator Bayh, the Senate sponsor of Title IX, stated:

> What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated. *Cong. Rec.* S 13554 (daily ed. August 6, 1971).[1]

However, any ambiguity as to whether revenue producing intercollegiate athletics are an education program or activity under Title IX was eliminated in 1974 by the enactment of section 844 of the Education Amendments of 1974. The language of that section and its history make it clear that it is Congress' intent that revenue producing intercollegiate athletics be included in the term.

On May 20, 1974 Senator John Tower of Texas introduced an amendment to Title IX exempting revenue produc- athletics. It stated:

> [T]his section [901 of Title IX] shall not apply to an intercollegiate athletic activity to the extent such activity does or may provide gross receipts or donations to the institution necessary to support that activity. *Cong. Rec.* S 8488 (daily ed. May 20, 1974).

The amendment was adopted on the floor of the Senate by voice vote. The Conference Committee on the Education Amendments of 1974 deleted Senator Tower's amendment. Instead the Conference adopted what was to become section 844 of the 1974 Amendments, commonly referred to as the "Javits Amendment." It provides as follows:

> The Secretary [of HEW] shall prepare and publish. . .proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in Federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports.* (Emphasis added.)

In our judgment, Congress has made it clear, by rejecting an exemption from Title IX for revenue producing athletics and adopting section 844, which requires the promulgation of Title IX regulations that include reasonable provisions concerning intercollegiate athletic activities, that revenue producing intercollegiate athletics are an "education program or activity" within the meaning of Title IX.[2] An institution of higher education must, therefore, comply with the prohibition against sex discrimination imposed by Title IX in the administration of any revenue producing intercollegiate athletic activity if the activity is receiving Federal financial assistance, directly or indirectly.

There are some revenue producing intercollegiate athletic activities that clearly receive direct Federal financial assistance. Funds provided under Title VII of the Higher Education Act, for example, may be used to build facilities that are used, in part, for revenue producing athletics. While it is clear that assistance of this kind which directly supports an intercollegiate athletic program would subject the program to the requirements of Title IX and the implementing regulations, such direct assistance is not common. Other kinds of assistance that bear a less direct relationship to revenue producing intercollegiate athletics, particularly student financial assistance, are more common.

It is well established that general student financial assistance, such as guaranteed student loans and grants, provided by the Federal government to assist a student in paying the cost of attending an institution of higher education is Federal financial assistance to the institution. *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *affd. sub. nom., Bob Jones University v. Roudebush*, 529 F. 2d 514 (4th Cir. 1975). Historically, intercollegiate athletics have been described as an integral part of general undergraduate education. For example, the 1976-77 Manual of the National Collegiate Athletic Association, the private association that regulates much of the nation's intercollegiate athletics, contains the following statement of fundamental policy:

> The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by so doing, retain a clear line of demarcation between college athletics and professional sports. *Manual*, at 5.

In our view, therefore, student financial assistance is Federal financial assistance to the revenue producing athletic programs of the student's institution of higher education.

The inclusion of revenue-producing intercollegiate athletics within the education programs and activities receiving Federal financial assistance is not the only basis on which an institution of higher education is required to comply with Title IX in the administration of such programs. It is well settled, with respect to the prohibition against discrimination on the basis of race, religion, color or national origin imposed by Title VI of the Civil Rights Act of 1964, that Federal financial assistance may not be provided to any program or activity which is either administered in a discriminatory manner or "infected by a discriminatory environment." *Board of Public Institution of Taylor County, Florida v. Finch*, 414 F. 2d 1068, 1078 (5th Cir. 1968).

Under this infection doctrine, a Federal grantee is required to comply with Title VI in the administration of an activity that does not receive Federal financial assistance if that activity is so closely related to, and such an integral part of, a program or activity that does receive Federal financial assistance that discrimination in the administration of the former would infect the latter.

The infection doctrine is as applicable to Title IX of the Education Amendments of 1972 as it is to Title VI of the Civil Rights Act of 1964. As indicated previously, historically intercollegiate athletics have been described as an integral part of general undergraduate education. In our view, revenue producing intercollegiate athletics are so integral to the general undergraduate education program of an institution of higher education that sex discrimination in the administration of a revenue producing athletic activity would necessarily infect the general undergraduate education program of the institution.

Therefore, in our opinion, an institution of higher education which is receiving Federal financial assistance for its general undergraduate education program must comply with the prohibitions against sex discrimination imposed by Title IX in the administration of its revenue producing intercollegiate athletic activities regardless of whether those athletic activities are themselves receiving Federal financial assistance.

The Secretary, in fulfilling his obligation to assure that institutions of higher education receiving Federal financial assistance comply with Title IX, is authorized to promulgate regulations and policies defining what constitutes discrimination prohibited by that title. In our opinion, the provisions of the current Title IX regulations and the Department's policies that deal specifically with athletics, including revenue producing intercollegiate athletics, are consistent with the statutes and are a proper exercise of the Secretary's discretion. The text of the regulations, 45 C.F.R. 86.41, is attached at Tab B. [Tab B omitted]

It should also be noted that in our view the current Title IX regulations and policies allow flexibility in their application to revenue producing intercollegiate athletics.

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[1]Other comments in the debates refer, in passing, to the possible need to maintain separate physical education facilities, S 1769 (daily ed., Feb. 15, 1972), 92d Cong., 2d Sess., comments of Sen. Bayh; and S 2747 (daily ed., Feb. 28, 1972), 92d Cong., 2d Sess., comments of Sen. Bayh.

[2]The history of Congressional action on other proposals for amending Title IX with respect to intercollegiate athletics and on proposals for Congressional disapproval of the Department's regulations implementing that Title tend to further support this conclusion. A brief summary of that history is attached at Tab A.

[TAB A]

*CONGRESSIONAL ATTEMPTS TO EXEMPT REVENUE-PRODUCING SPORTS FROM TITLE IX**

The following is a brief description of attempts by Congress, all of which were unsuccessful, to exempt revenue-producing sports from coverage of Title IX.

A. Amendments or Proposed Amendments of Statute

- May 20, 1974, Senator Tower introduced an amendment to the Education Amendments of 1974 to exempt revenue-producing sports from Title IX. [Adopted by the Senate but deleted by the Conference Committee.] *
- June 1975, Rep. O'Hara introduced H.R. 8394 to allow revenue-producing sports to use their profits to maintain their own teams before diverting any profits to other men's or women's teams. [Bill was referred to the House Subcommittee on Postsecondary Education, considered, and reported to the full Committee, which voted 30-8 to recommit it to the Subcommittee where no further action was taken.]
- July 15, 1975, Senators Tower, Bartlett and Hruska co-sponsored S 2106, a bill to exclude coverage of revenue-producing sports from Title IX. [Referred to the Senate Subcommittee on Education, was considered in hearings on September 16 and 18, 1975, but was never reported out of committee.]

B. Proposed Concurrent Resolutions Disapproving the HEW Title IX Regulation

Under Section 431(d) and (f) of the General Education Provisions Act, HEW was required to submit any Title IX regulation to Congress for review 45 days before its effective date. During the 45-day period, the law allows Congress, by concurrent resolution to disapprove the regulation in whole or in part. On June 4, 1975, the present Title IX regulation was transmitted to Congress. Several concurrent resolutions were proposed, some of which concerned revenue-producing sports.

- June 5, 1975, Senator Helms introduced S. Con. Res. 46 disapproving the entire Title IX regulation. [No action was taken.]
- June 17, 1975, Rep. Martin introduced H. Con. Res. 310, disapproving the entire Title IX regulation, and H. Con. Res. 311, disapproving the regulations's provisions on intercollegiate athletics. [Both resolutions were considered and rejected by the House Postsecondary Education Subcommittee.]
- July 16, 1975, Senators Laxalt, Curtis, and Fannin co-sponsored S. Con. Res. 52, disapproving the application of Title IX to intercollegiate athletics. [Resolution was referred to the Subcommittee on Education of the Senate Committee on Labor and Public Welfare where no action was taken on it.]

C. Independent Bills on the Subject of Athletics

In addition to the foregoing proposed amendments to Title IX, two independent bills have been introduced that would have, or would have had, the effect of exempting intercollegiate athletics from Title IX.

- July 21, 1975, Senator Helms introduced S 2146, a bill that prohibited federal agencies from enforcing regulations pertaining to athletics where participation in those athletic activities was not a required part of the curriculum of an educational institution. [No action taken on this bill during the 94th Congress.]
- January 31, 1977, Senator Helms reintroduced what had been S 2146 (see previous item) as S 535. [No action has yet been taken on this bill.]

*This summary was appended to the preceding HEW memorandum.

*In lieu of the proposed Tower Amendment, in July 1974 Senator Javits proposed to the Conference Committee an amendment to require HEW to include in its Title IX regulation with respect to intercollegiate athletics, "reasonable provisions considering the nature of particular sports." This amendment was included in the Education Amendments of 1974 enacted in August 1974.

THE IMPORTANCE OF EQUAL ATHLETIC OPPORTUNITY FOR WOMEN

To: The Secretary [of HEW]

March 23, 1978

From: Dorothy Ross for the Title IX Task Force,
The Secretary's Advisory Committee on the
Rights and Responsibilities of Women

Re: The Importance of Equal Athletic Opportunity for Women

If only 5% of college students engage in intercollegiate athletics,[1] why is enforcement of Title IX in this area important?

A. Because college athletics is the capstone of the whole system of athletic participation in high schools and communities: the growing surge of athletic activity among girls and women cannot be sustained unless college athletic programs provide equal opportunities for women.

B. Because in America sports is an important means of socialization and education: the overwhelming male domination of sport in America perpetuates outworn sex-stereotypes and unfair male advantages. Pundits can easily trivialize the marginal regulations that go with Title IX enforcement—e.g., the comparative size of trophies—but the truth is that sports reaches the most fundamental attitudes and values in our culture.

In the past five years, girls' participation in sports and public interest in women's sports has increased dramatically. The passage of Title IX, even with minimum enforcement, opened doors to this activity, but it rests on real changes in girls' desires and public attitudes. In 1971 only 7% of high school athletes were girls; in 1976, 29% were girls.[2] In communities where boys' athletics had been the only focus of community interest, girls' teams in soccer and basketball, for example, when given facilities and promotion, have captured equal public enthusiasm.[3] On national TV women's sports have gained steadily in coverage, from Olympic events, women's tennis, and now women's basketball. We cannot know how wide and how popular the participation of girls and women in sports can become unless they are given equal opportunity at all levels to develop their interests and skills.

Collegiate athletic opportunity is crucial for the wave of high school athletes now moving into college and for the young women athletes who want to qualify for amateur and professional careers in sports. Under the gentle prodding of Title IX, colleges have made some progress. Since 1974, the average budget for women's athletics has risen from 2% of the budget for male athletics to between 4 and 8%.[4] But, as the President's Commission on Olympic Sports recently concluded, "Opportunities for women still fall short of what is wanted and needed. Women continue to suffer from a lack of well-structured, varied programs. . .funds for those programs, access to facilities and proper representation in the decision and policy-making process in organizations conducting sport programs."[5]

Inadequate opportunities in collegiate athletics fall particularly hard on minority women. While minority men from poor families, for example, are substantially represented in American Olympic competition, most Olympic women come from well-to-do families, who can buy them the training and facilities a winning athlete needs, but which are unavailable to girls in general, and therefore to poor girls. In addition, athletic scholarships have traditionally been an avenue of advance for minority men. NCAA colleges annually give tens of millions of dollars in athletic scholarships. If equal athletic opportunity were available for women, many minority women too would benefit from careers opened by a college education.

Intercollegiate athletics is an important agent of education not only for those who participate, but for the many girls who emulate their example in lower schools and intramural sports. Numerous studies have shown that athletic achievement fosters self-confidence, and self-confidence, in turn, fosters other kinds of achievement. On a fundamental level, "the ability to control the nerve-muscle mechanisms of the body in acts of skill fosters the growth of an individual's sense of personal worth, self-reliance, personal freedom, and increases his worth as a social being."[6] In addition, competitive team sports—traditionally a male preserve—provide training in initiative and in the interplay of aggressiveness and team-play so crucial in the adult world of work. At a time when 57% of all women between the ages of 18 and 64 are in the workforce, discrimination in sports constitutes a serious deprivation of educational opportunity and future economic opportunity.

Intercollegiate athletics also influences the millions of young people and older people who participate vicariously, who watch. Sport is a kind of symbolic enactment of a society's ideal values, which codifies and teaches the society's most valued traits. Male-dominated sports teaches as powerfully as any element in the culture that 'men and boys do while women and girls watch." Equal athletic opportunity for women could change sex-stereotyping on that fundamental level.

FOOTNOTES

1. Estimate based on NCAA and AIAW data showing 280,000 male and 150,000 female athletes in their member institutions.
2. Data from the National Federation of State High School Associations. The 29% figure in 1976 represents 1,645,000 female high school athletes.
3. The San Francisco press, e.g., recently reported that girl's high school basketball was outdrawing boy's basketball in San Francisco. There are similar reports from towns and cities all over the country.
4. Candace Lyle Hogan, "From Here to Equality," *womenSports*, September, 1977, p. 16.
5. *The Final Report of the President's Commission on Olympic Sports 1975-1977.* Executive Summary, p. 5.
6. Harry Edwards, *The Sociology of Sport*, Homewood, Ill. Dorsey Press, 1973, pp. 233-234.

Prices quoted in this publication are subject to change.

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